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No. 89-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANICE BIRNBAUM and SAUL BIRNBAUM, as Executors, and ILENE L. FLAUM and CENTRAL TRUST COMPANY, as Temporary Co-Administrators c.t.a., of the Estate of Bernard P. Birnbaum, Deceased,

Petitioners,

v.

THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of New York

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PETITIONERS' REPLY BRIEF

E. BARRETT PRETTYMAN, JR.*
DAVID G. LEITCH
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5685

* *Counsel of Record* — *Counsel for Petitioners*

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PETITIONERS' REPLY BRIEF

I. THE STATE'S ACTION REQUIRED THE ESTATE TO CONTINUE TO OPERATE ABBOTT MANOR AND TO INCUR SUBSTANTIAL OPERATING LOSSES AGAINST ITS WILL

There can be no dispute that the State required Abbott Manor to remain open despite the Estate's desire to close the facility and thereby end its losses on the home's operation. The State's Brief in Opposition implies in various

places that readily-available procedures would have allowed the Estate to close the home at any time before or during the receiverships. That is simply not the case.

Thus, for example, the State asserts, without citation of authority, that it interpreted certain regulations "to mean that a notice of intent to close, coupled with an acceptable orderly plan of closure, renders the Department powerless to prevent a closure." Brief in Opposition at 5. Yet the record is replete with evidence that despite the Estate's oft-stated intent to close, the Department did prevent closure by simply declining to deem any plan of closure "acceptable." It was in fact the State's effort to prevent such closure that first brought this action into the courts. The State also takes comfort in its assertion that the Estate did not object to continuation of the possessory receivership, without acknowledge that the court had at that time obligated the State to compensate the Estate for its losses. If anything is clear from the record of many years of controversy between the State and the Estate, it is that the State required continued operation of the home against petitioner's will.

In any event, the decision of the Court of Appeals plainly rested on such an understanding of the facts. Thus, the court asked whether a taking occurs "when *the State requires* a nursing home to remain open * * *," App. 1a (emphasis added), and "when a business *is required* to continue operations at a loss * * *." App. 7a (emphasis added). As the case comes to this Court, the New York Court of Appeals has answered these questions in the negative. That answer, as demonstrated in the Petition, rests on a serious misunderstanding of the Takings Clause and should not be allowed to stand.[1]

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[1] For a recent case from the Third Circuit emphasizing, as noted in the Petition, that this Court has "invariably found a taking" where an occupation of property has occurred, see *Pinewood Estates of Michigan* v. *Barnegat Township Leveling Bd.*, 1990 U.S. App. LEXIS 3171, at * 10 (3d Cir. Mar. 7, 1990).

II. THE ISSUES ARE IMPORTANT AND RECURRING

In addition to the reasons set forth in the Petition demonstrating the importance of the takings question presented here, there is another reason why the State is in error to attempting to make the case appear fact-specific. What happened in New York could happen just about anywhere. There are facilities throughout the 50 States and the District of Columbia that provide care for the elderly, including medical, hospice, adult care, and nursing home centers. Thirteen States require license holders to notify the respective governing agencies of an intent to close,[2] and seven States and the District of Columbia statutorily provide for the appointment of a receiver upon notice of an intent to close.[3] Of these jurisdictions, only three States and the District of Columbia allot special funds to provide financial support to meet a receiver's expenses in situations like the one here.[4]

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[2] These states are: Alaska (Alaska Stat. § 18.07.061 (1983)), Iowa (Iowa Admin. Code 481-57.6(4) (1988), 58.5(4) (1987) and 59.5(4) (1987)), Kentucky (Ky. Rev. Stat. § 216B.065 (Banks/Baldwin 1982)), Minnesota (Minn. R. 9545.0530 Subp. 9 (1987)), Nebraska (Neb. Regs. and Standards, tit. 175, § 003.6A (1989)), New York (N.Y. Comp. Codes R. & Regs. § 401.3(g) (1988)), Ohio (Ohio Rev. Code § 3721.19 (Bank/Baldwin 1989)), Pennsylvania (28 Penn. Code § 201.23 (1987)), Texas (Tex. Admin. Code tit. 25, § 115.8(4) (1988)), Utah (Utah Admin. R. 432-100-2 (1989)), Vermont (Code of Vt. R. § 2-09A (1982)), Washington (Wash. Admin. Code § 248-31-010(5) (1986)) and West Virginia (64 C.S.R. 12 § 6.4.3 (1987)).

[3] These states are: Arkansas (Ark. Code Ann. § 20-10-904 (1989 Supp.)), Colorado (Colo. Rev. Stat. § 25-3-108 (1986)), Florida (Fla. Stat. Ann. tit. 29, § 400.126 (West 1986)), Indiana (Ind. Code Ann. § 16-10-4-20 (West 1989)), Illinois (Ill. Rev. Stat., Ch. 111½, 4153-423, 4153-501 (1987)), Maine (Me. Rev. Stat. Ann. tit. 22, § 7933 (1987)) and Oklahoma (Okla. Stat. Ann. tit. 63, § 1-1932 (1980)).

[4] These states are: Illinois (Ill. Rev. Stat., Ch. 111½, para. 4153-511 (1987)), Oklahoma (Okla. Stat. Ann. tit. 63, § 1-1934 (1980)) and Arkansas (Ark. Code Ann. § 20-10-916 (1989 Supp.)). *See also* D.C. Code § 32-1419 (1981).

Therefore, in most jurisdictions an effort to prevent the closing of homes for the elderly would result in the same situation that obtains here, where the State's use of its naked power would not be backed by a concomitant willingness to pay the license holder fair compensation. With care for the elderly increasing daily, the problem of what to do with the centers that house them cannot go unresolved.

CONCLUSION

For each of the foregoing reasons, and those stated in the Petition, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
DAVID G. LEITCH
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5685

* *Counsel of Record*

Counsel for Petitioners